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Supreme Court, U.S.
FILED
MAY 5 - 2005
OFFICE OF THE CLERK

No. 04-1424

IN THE

Supreme Court of the United States

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

GREGORY N. BULLARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in following the established substantive law of Kentucky and acted within its discretion in denying petitioner's late request for certification to the Supreme Court of Kentucky, which was waived by petitioner?

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STATEMENT OF THE CASE

Respondent does not accept the petitioner's Statement of the Case, which bears no resemblance to the relevant facts and applicable law. The following are the facts and law which respondent considers essential to a fair and accurate Statement of the Case.

Respondent filed suit in United States District Court against petitioner, his former employer, for wrongful discharge under KRS 342.197, the pertinent Kentucky statute. KRS 342.197(1) mandates that no employee shall be harassed, coerced, discharged or discriminated against in any manner whatsoever for filing and pursuing a workers' compensation claim. In addition, KRS 342.197(3) mandates that any individual injured by any act in violation of subsection (1) shall have a civil cause of action to recover the actual damages sustained by him, together with the costs of the lawsuit, including a reasonable fee for his attorney of record.

At the trial respondent testified that he served in the United States Marine Corps from 1983 to 1993. Before he was discharged in 1993, he was examined by a doctor and passed the physical examination. He was in excellent physical condition. He started working for petitioner in February, 1995. Before beginning his employment with petitioner, he was examined by a doctor chosen by the company. He passed the physical examination by the company doctor, being in excellent physical condition.

Respondent's job was a manual labor job requiring driving a forklift or tow motor. He had to continuously twist and turn his neck on the job to look around behind him, since

90-95% of his work time was spent driving the fork truck in reverse. He had to drive the forklift or tow motor over rough surfaces, causing him a lot of jarring and jostling.

While working for petitioner in 1995 and 1996, respondent's neck started getting "real stiff." He also started getting bad headaches and numbness in his arms and fingers. His physical symptoms gradually developed in 1995 and 1996.

In 1996 respondent went to Dr. Patterson in Russellville for treatment. In August, 1996, Dr. Patterson had x-rays taken of his neck, which were within normal limits for a man his age.

During the years 1996, 1997, 1998 and 1999 respondent's physical symptoms gradually got worse. The numbness in his arms and his headaches got much worse. He continued under Dr. Patterson's treatment.

By the summer of 1999, respondent's physical condition had gotten very poor. His headaches were much stronger, his arms were going numb, and he had neck pain. He told his supervisors that the "fork truck was killing me."

Respondent went to Dr. Patterson for treatment in August, 1999 and Dr. Patterson had repeat x-rays taken of his neck. Dr. Patterson told him that his neck was "destroyed." Dr. Patterson placed permanent restrictions on him, telling him not to drive a forklift or tow motor and giving him a letter so stating to take to his employer.

Respondent delivered Dr. Patterson's letter to the nurses at the plant medical department and also to his supervisors

in August, 1999. He told his supervisors that his neck was hurting and that the fork truck was "just killing him." In August, 1999 he told the plant nurses that he was making a workers' compensation claim. Petitioner did not take a statement from him about his work injury or investigate his workers' compensation claim.

Respondent was referred to Dr. Berkman, a neurosurgeon in Nashville, Tennessee, who examined his neck and had an MRI of his neck performed. In September, 1999, Dr. Berkman told him and his wife that his neck had been "destroyed by his work on the fork truck." Respondent again told the nurses at the plant that he was making a workers' compensation claim based on what Dr. Berkman told him.

In September, 1999 Dr. Berkman had respondent admitted to the hospital and performed a three-level cervical fusion. After the neck surgery, Dr. Berkman placed permanent physical restrictions on him, telling his employer that he was totally disabled. Under the physical restrictions placed on him by Dr. Berkman, respondent was unable to return to his former job at the plant. He last worked for petitioner on September 7, 1999.

In 1999 respondent was attending Western Kentucky University, studying computer science. After he had his neck surgery in September, 1999, he asked Devon Harper, petitioner's personnel manager, for a lighter job working with computers or in the finance department. These were light jobs for which he was trained and educated. Petitioner had computer jobs and accounting jobs available in the plant at that time, but refused to give him a computer or accounting job.

Petitioner fired respondent on April 12, 2000. Devon Harper, the personnel manager, and Larry Carlisle, his supervisor, told him that they were going to terminate him. Larry Carlisle, his supervisor, told him that he was being fired for making a false workers' compensation claim. Devon Harper, the personnel manager, told him that the company was paying him and was not getting anything out of him.

Respondent filed a formal workers' compensation claim. The Administrative Law Judge in the workers' compensation case decided the case in his favor in both 2000 and 2002, awarding him workers' compensation benefits, including his medical bills and expenses and the costs of his education at Western Kentucky University. Petitioner then appealed the Judge's decision to the Workers' Compensation Board, which unanimously affirmed the Administrative Law Judge's decision. Petitioner then appealed the case to the Court of Appeals of Kentucky.

Petitioner refused to pay respondent any workers' compensation benefits and he had to pay the costs of his education at Western Kentucky University out of his own pocket. He had no income, was unable to pay his bills and had to file bankruptcy in late 2000.

At the trial, respondent testified that on numerous occasions between August, 1999 and the time he was fired in April, 2000, he told the plant nurses and his supervisors that he was going to make a workers' compensation claim for his neck injuries.

Respondent's testimony on direct examination and re-direct examination appears in the Transcript of Jury Trial, Vol. 1, PP. 90-116 and PP. 139 & 140.

Dr. Merrill Patterson, respondent's treating chiropractic physician, testified that he has practiced his profession in Russellville, Kentucky for 33 years and has treated respondent since 1996.

Dr. Patterson first treated respondent on August 2, 1996, at which time he related that he was having headaches, neck pain and stiffness and numbness in his hands. Dr. Patterson had x-rays taken of respondent's neck, which were within normal limits for a man his age. Dr. Patterson continued to treat him in 1996, 1997 and 1999, seeing him on approximately 15 occasions. Respondent continued to have symptoms of stiffness and pain in his neck, as well as headaches. His neck pain got worse.

On August 17, 1999, Dr. Patterson had repeat x-rays taken of respondent's neck, which showed significant advanced disc and spinal degeneration and deterioration. The 1999 x-rays showed neck injuries way out of proportion for a man his age.

Dr. Patterson testified that respondent's history was that he started working at the Alcan plant in 1995 at a job driving a forklift or tow motor, that he spent 90% of his time backing up and driving in reverse and that he had to constantly look over both shoulders behind him and constantly twist and turn his neck, that he also drove over rough surfaces most of the time, getting a lot of jarring and jostling, and that from 1995 to 1999 he gradually developed stiffness and pain in his neck and numbness in both arms and headaches. On August 18, 1999, Dr. Patterson gave respondent a letter and told him to deliver it to his employer. In the letter Dr. Patterson recommended that respondent permanently refrain from looking back driving a towmotor at work, and restricted his lifting.

Dr. Patterson testified that it was his opinion, based on reasonable chiropractic probability, that respondent suffered injuries to his neck due to his work at the petitioner's plant during the years 1995 to 1999 and that the repetitive wear and tear to his neck caused the neck injury which he found in August, 1999. Dr. Patterson based his opinions on his professional education, reliable chiropractic literature, 33 years of practice in his profession and his treatment of respondent Bullard since 1996.

Dr. Patterson's trial testimony appears in the Transcript of Jury Trial, Vol. 1, PP. 140-151 and 156-157.

Respondent's wife also testified at the trial. She stated that before her husband started working at petitioner's plant in 1995, he was in excellent physical condition and had never had any previous injuries to his neck or arms.

During the years respondent worked at the plant from 1995-1999, he complained frequently of headaches, neck pain, numbness in his arms and tingling in his hands. His neck pain and arm pain gradually got worse from 1995-1999.

She went with her husband to Dr. Berkman's office in September, 1999. After Dr. Berkman examined him and read his neck x-rays and MRI, he told them that his neck symptoms were probably the result of the fork truck operation and twisting and turning of his neck.

Her testimony appears in the Transcript of Jury Trial, Vol. 1, Pages 158-163.

Respondent testified on rebuttal at the trial. He stated that he did not apply for long-term disability benefits with petitioner because Devon Harper, the personnel manager, told him that his chances of getting such benefits were "slim to none." In addition, he never received any papers on which he could make an application for such benefits. He refuted the testimony of Linda Pillow, the physical therapist, and stated that he did not fill in the form stating that he did not have a work injury. Respondent testified that it had been ruled by the judge in his workers' compensation case that the handwriting on the form was not his.

Respondent's rebuttal testimony appears in the Transcript of Jury Trial, Vol. 2, PP. 20-35.

At the trial in District Court, the jury awarded respondent damages against petitioner and a Judgment and Amended Judgment were entered in favor of respondent.

In the first Opinion, Award and Order in the workers' compensation case, dated October 24, 2000, the Administrative Law Judge ruled that:

1. Respondent's neck injury was caused by his work for his employer;

2. He gave due and timely notice of his work injury to his employer;

3. His workers' compensation claim was filed within the statute of limitations;

4. He is entitled to recover from his employer workers' compensation benefits, consisting of temporary total

disability benefits from September 8, 1999 to June 5, 2000, permanent partial disability benefits beginning on June 6, 2000 for 425 weeks, his work-related medical bills and expenses and also benefits for vocational rehabilitation. The Administrative Law Judge allowed petitioner a credit or setoff for the contractual short-term disability benefits ($18,579.00) which it paid to respondent to apply against the workers' compensation benefits for temporary total disability.

On March 21, 2001, the Workers' Compensation Board unanimously affirmed the Administrative Law Judge's Opinion, Award and Order in favor of respondent against his employer. The Workers' Compensation Board ruled that his neck injury was caused by his work, that he gave due and timely notice of his work injury to his employer, that he filed his workers' compensation claim well within the statute of limitations and that he was entitled to recover workers' compensation benefits from his employer.

Petitioner then moved to reopen the case before the Administrative Law Judge, claiming fraud and newly discovered evidence. The workers' compensation case was relitigated before the Administrative Law Judge. On August 16, 2002, the Administrative Law Judge rendered his Opinion and Order on Reopening, finding that respondent testified credibly throughout the case, that there was no fraud, that the additional evidence showed that his neck injury was caused by his work for petitioner, that he gave due and timely notice of his work injury to his employer and that he was entitled to recover workers' compensation benefits from his employer. The Administrative Law Judge dismissed petitioner's Motion to Reopen and affirmed his previous October, 2000 Opinion and Award.

Petitioner then appealed to the Court of Appeals of Kentucky. The Court of Appeals of Kentucky in an unanimous opinion rendered on February 7, 2003 affirmed the prior decisions of the Administrative Law Judge and the Workers' Compensation Board, holding that substantial evidence and the applicable law supported the previous rulings confirming respondent's neck injury, due and timely notice to his employer of his work injury, the filing of his workers' compensation claim within the statute of limitations and his entitlement to workers' compensation benefits.

Petitioner then appealed to the Supreme Court of Kentucky, which affirmed the Administrative Law Judge on the statute of limitations and medical causation issues, but remanded the case to the Administrative Law Judge to determine whether petitioner was prejudiced by failure to receive earlier notice. The Administrative Law Judge ruled in his Order on Remand dated October 11, 2004 and Order on Reconsideration dated December 3, 2004 that there was no prejudice to petitioner in any way and again ordered petitioner to pay respondent workers' compensation benefits. Petitioner then appealed to the Workers' Compensation Board of Kentucky, which by Order dated April 15, 2005 held that there was ample substantial evidence to support the Administrative Law Judge's ruling in favor of respondent.

This case was briefed and argued in the United States Court of Appeals for the Sixth Circuit, which rendered its comprehensive and well-reasoned Opinion on November 3, 2004, affirming on de novo review the Amended District Court Judgment in favor of respondent. All three members of the panel agreed that the District Court Amended Judgment should be affirmed.

Petitioner then filed in the Court of Appeals a Petition for Panel Rehearing and rehearing en banc, for the first time asking the Court of Appeals under Rule 76.37 of the Kentucky Rules of Civil Procedure to certify a question of law to the Supreme Court of Kentucky. The Court of Appeals circulated the Petition to the three members of the original panel and also to all other active Judges of the Court of Appeals, and no Judge of the Court of Appeals requested a vote on the petition for rehearing en banc, and the original panel reviewed the Petition for Rehearing and unanimously concluded that the issues raised in the Petition for Rehearing were fully considered upon the original submission and decision of the case. By Order dated January 21, 2005 the Court of Appeals denied petitioner's Petition for Rehearing.

REASONS FOR DENYING THE PETITION

Review is not appropriate for three reasons. First, the Court of Appeals correctly applied settled Kentucky substantive law in affirming the District Court Judgment. The Court of Appeals cited the pertinent Kentucky statutes and the numerous decisions of the Kentucky appellate courts. Second, there is no conflict among the circuits. The Court of Appeals' Order denying petitioner's Petition for Rehearing follows the same governing principles as has every federal Court of Appeals in considering a request that the Court of Appeals certify a question of law to a state Supreme Court. Third, this case's procedural history warrants denial of review. Petitioner never filed a motion asking the Court of Appeals to certify a question of law to the state Supreme Court of Kentucky. After the Court of Appeals rendered its Opinion, the petitioner in its Petition for Rehearing belatedly attempted to request the Court of Appeals to certify a question of law to the Supreme Court of Kentucky. Petitioner waived

its motion for certification to the Supreme Court of Kentucky. The Court of Appeals acted properly in its discretion in denying petitioner's Petition for Rehearing.

ARGUMENT

In its Opinion, the Court of Appeals noted that

> "To prevail on a workers' compensation retaliatory discharge claim under Kentucky statute KRS 342.197(1), the plaintiff must prove that he was: (1) 'engaged in statutorily protected activity,' (2) was discharged, and (3) 'there was a connection between the protected activity and the discharge.' *Henderson v. Ardco, Inc.*, 247 F.3d 645, 654 (6th Cir.2001) (quoting *Willoughby v. GenCorp., Inc.*, 809 S.W.2d 858, 861 (Ky.Ct.App.1990)). An employee may maintain a retaliatory discharge claim under KRS 342.197 where the employer fires the employee before the employee institutes formal compensation proceedings. *Overnite Transportation Company. v. Gaddis*, 793 S.W.2d 129, 130 (Ky.Ct.App.1990). A claim is established if the plaintiff proves she 'intended to file and pursue a lawful workers' compensation claim.' *Southerland v. Hardaway Management Co., Inc.*, 41 F.3d 250, 256 (6th Cir. 1994) (quoting *First Property Management Corporation v. Zarebidaki*, 867 S.W.2d 185, 189 (Ky. 1994))."

The Court of Appeals further noted that

> "An employer may be held liable under KRS 342.197(1) for retaliatory discharge if the jury believes that the employee's pursuit of a workers' compensation claim was one of the substantial factors motivating the discharge decision, notwithstanding proof that the employee would have lawfully been discharged anyway. *First Prop. Mgmt. Corp.*, 867 S.W.2d at 188. An employee is not entitled to recovery if the employer proves the employee was discharged 'solely because of her inability to perform her job.' *Southerland*, 41 F.3d at 256."

The Court of Appeals further stated that

> "Bullard was not required to provide Alcan with statutory notice under KRS 342.197(1). *Overnite Transp. Co.*, 793 S.W.2d at 130-31. The issues of when an employer knew that an employee intended to pursue a workers' compensation claim, and when an employer received written statutory notice under KRS 342.185(1), are completely different. Relative to Alcan's pre-termination knowledge of Bullard's intent to pursue a workers' compensation claim, Bullard testified to the jury that he told Alcan plant nurses, a safety representative, and a supervisor well before he was discharged that he believed his neck injury was caused by driving the forklift, and that he intended to 'make' a workers' compensation claim. Bullard further testified that team leader Carlisle told him the day he was discharged that 'you're being fired

> for making a false workers' comp. claim.' Construed in a light most favorable to Bullard, reasonable jurors could conclude that Alcan knew prior to discharge that Bullard intended to pursue a workers' compensation claim, and relied on that knowledge as a substantial factor in firing Bullard, notwithstanding Alcan's proofs to the contrary that Bullard was discharged for misrepresentations he made relative to tuition benefits. *See First Prop. Mgmt. Corp.*, 867 S.W.2d at 188. Whether an employer was motivated to discharge an employee for intending to file a workers' compensation claim is ultimately for the jury to decide." *Willoughby*, 809 S.W.2d at 862.

The Court of Appeals held that the doctrine of collateral estoppel did not bar Bullard from litigating whether and when Alcan knew Bullard intended to pursue a workers' compensation claim, and whether Alcan's knowledge of that intent was a substantial factor used in the decision to discharge Bullard.

The Court of Appeals therefore affirmed the District Court's Amended Judgment.

Rule 76.37 of the Kentucky Rules of Civil Procedure provides that any United States Court of Appeals *may* invoke the rule upon the Court's own motion or upon motion by any party and certify to the Supreme Court of Kentucky a question of Kentucky law where there is no controlling precedent in the decisions of Kentucky appellate courts. The rule clearly vests in the United States Court of Appeals discretion as to whether it should certify a question of law to the Supreme Court of Kentucky if the Kentucky appellate courts have not already decided the matter.

The various United States Court of Appeals have consistently ruled that where there are sufficient sources of state law, including state appellate court decisions deciding the question, the Court of Appeals will deny a party's motion for certification to the state Supreme Court and decide the issue itself. *See State of Florida ex rel Shevin v. Exxon Corporation*, 526 F.2d 266 (5th Cir. 1976), *American Fidelity Bank & Trust Company v. Heimann*, 683 F.2d 999 (6th Cir. 1982), *Cantwell v. University of Massachusetts*, 551 F.2d 879 (1st Cir. 1977), *Jefferson v. Lead Industries Association, Inc.*, 106 F.3d 1245 (5th Cir. 1997), *Rural Water System #1 v. City of Sioux Center*, 202 F.3d 1035 (8th Cir. 2000), *Perkins v. Clark Equipment Company*, 823 F.2d 207 (8th Cir. 1987), *McLinn v. The F/V Fjord*, 744 F.2d 677 (9th Cir. 1984), *Massengale v. Oklahoma Board of Examiners in Optometry*, 30 F.3d 1325 (10th Cir. 1994), *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65 (7th Cir. 1981) and *Armijo v. Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988).

The cases cited by petitioner are clearly not on point with the applicable law and the relevant facts in our case. In those cases the state substantive law was unsettled and the Courts of Appeal exercised their discretion to certify the question to the state court, which is completely unnecessary and not appropriate in our case. Here the Kentucky substantive law was established and the Court of Appeals acted properly within its discretion in denying the petitioner's Request for Rehearing. In addition, the petitioner failed and refused to file with the Court of Appeals a timely motion to certify the question of law to the Supreme Court of Kentucky. It was only after the Court of Appeals had rendered its Opinion that petitioner filed a Petition for Rehearing, belatedly attempting to request the Court of Appeals to certify a question of law to the Supreme Court of Kentucky. This

was too late and petitioner clearly waived its request for certification. The Court of Appeals properly and unanimously denied petitioner's Petition for Rehearing.

The bottom line here is that petitioner's argument is both substantively and procedurally defective.

CONCLUSION

It is clear that certiorari is not warranted. The Court of Appeals correctly applied settled Kentucky substantive law. There is no conflict among the circuits. Petitioner's argument is both substantively and procedurally defective. Because there are no valid grounds for granting review, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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